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No. 80-415

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO AFFIRM

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ISSUES PRESENTED FOR REVIEW

(1) Whether the Rock Island Act's employee protection provisions violate the fifth amendment to the United States Constitution through their uncompensated taking of the private property of the Rock Island estate for a purported public purpose and without due process of law.

(2) Whether the Rock Island Act's employee protection scheme violates the due process, separation of powers and uniformity in bankruptcy provisions of the United States Constitution by its summary taking of the property of the Rock Island estate.

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WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; AND NEIL P. GOLDSCHMIDT, Secretary of Transportation,
Appellees.

On Appeal From The United States District Court For The Northern District Of Illinois, Sitting As A Railroad Reorganization Court

MOTION TO AFFIRM

William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees, and Henry Crown, et al. ("appellees"), pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully request that this Court note probable jurisdiction of this appeal, and affirm the Preliminary Injunction and Declaratory Judgment of the district court on the ground that the decision below was so obviously correct as not to warrant further review.

PRELIMINARY STATEMENT

This is an appeal from the preliminary injunction of Judge Frank J. McGarr, of the United States District Court for the Northern District of Illinois, against the implementation of the employee protection provisions of the Rock Island Transition and Employee Assistance Act, 45 U.S.C. §§ 1001, 1008 (May 30, 1980) ("Rock Island Act"). Those provisions would impose a $75,000,000 expense of administration obligation on the bankrupt Rock Island Railroad estate to fund a wholly new employee protection scheme. On June 9, 1980, the district court found that the Rock Island Act's employee protection scheme would work an unconstitutional taking of the property of the Rock Island estate, its creditors and shareholders, and would deprive them of due process of law in violation of the fifth amendment to the United States Constitution. Judge McGarr therefore enjoined the implementation of the Act to prevent irreparable injury to the estate. The Railway Labor Executives' Association ("RLEA") took this appeal from the district court's order under 28 U.S.C. § 1252, and this Court subsequently denied the appellant's application for a stay of the injunction.[1]

In the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980), Congress reenacted, without substantial change, the very same employee protection scheme, once again to be funded by imposing $75,000,000 in expense of administration obligations on the Rock Island estate. Section 124(c) of the amended statute provides that "nothing in this Act . . . shall limit the right to commence an action . . . under the Tucker Act." The district court denied the motions of the RLEA, the United States and the Interstate Commerce Commission, based upon the Staggers Rail Act amendments, to vacate the June 9, 1980 injunction. Judge McGarr

[1] *Railway Labor Executives' Ass'n* v. *Gibbons* (*In re Chicago, R. I. & P. R.R.*), 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980) (opinion denying stay application); 100 S. Ct. 3057 (July 2, 1980) (order denying stay application) (No. 80-415).

described the amendments as "cosmetic." App. F, *infra*, at f-2. The RLEA, the United States and the Commission appealed the denial of their motions to vacate to the United States Court of Appeals for the Seventh Circuit.[2]

This appeal is not mooted by the enactment of the Staggers Rail Act amendments or the pendency of the appeals in the court of appeals, as the federal appellees suggest in their response to the RLEA's Jurisdictional Statement dated November 30, 1980. The government's contention assumes that the court of appeals will reverse the determination of Judge McGarr that the "cosmetic" amendments to the Rock Island Act scheme did not alter its fundamental constitutional defects. Because the basic employee protection scheme was not repealed, as the government argues, but was reenacted without substantial change by the Staggers Rail Act, the questions raised in this appeal regarding the constitutionality of the Act's basic employee protection provisions and its imposition of a $75,000,000 cost of administration expense for new labor protection obligations remain ripe for adjudication by this Court.[3]

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[2] *In re Chicago, R. I. & P. R.R.*, Nos. 80-2487 and 80-2536 (7th Cir., *oral argument en banc* Nov. 17, 1980). Under the Staggers Rail Act amendments, the ruling of the court of appeals concerning the appeals pending before it must issue by December 28, 1980.

[3] The appellees submitted to the court of appeals the significant jurisdictional issues raised by the subsequent appeal to that court of an order denying a motion to vacate an order already appealed to this Court under 28 U.S.C. § 1252, in a Motion to Dismiss filed on October 25, 1980. That motion was argued with the merits of the appeals to that court on November 17, 1980, and still pends in that court. In light of the jurisdictional arguments made in that motion, it is unclear whether the Seventh Circuit will accept jurisdiction over those appeals and what questions, if any, it will consider.

The appellees subsequently filed a petition for a writ of certiorari before judgment concerning those appeals, which still pends in this Court. *Gibbons* v. *Railway Labor Executives Ass'n*, No. 80-704 (U.S., *petition for cert. filed* Oct. 30, 1980).

Judge McGarr was clearly correct in his determinations that the Rock Island Act's imposition of a new $75,000,000 labor protection obligation on the bankrupt Rock Island is unconstitutional. The appellees also submit that he was manifestly correct in his later ruling that the oblique reference in the Staggers Rail Act amendments to the Tucker Act had no significant effect on the unconstitutionality of the statute as reenacted.

For these reasons, the appellees respectfully request that this Court note probable jurisdiction of this appeal, and summarily affirm the decision of the district court that the basic Rock Island Act employee protection scheme is unconstitutional.

STATEMENT OF FACTS

The Failure of Reorganization Efforts

Following a decade of devastating losses[4] the Rock Island filed for reorganization under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. § 205, on March 17, 1975. At Judge McGarr's direction, over the objections of the creditors and shareholders, the Trustee continued rail operations during the ensuing four and one-half years in an effort to preserve rail service pursuant to the public interest objectives of Section 77. Unfortunately, the Rock Island's losses did not abate but accelerated.[5] By the summer of 1979, the Trustee's cash reserves had dwindled to the point where the Trustee could no longer pay his operating expenses.[6]

Despite the Trustee's dire financial straits, the Brotherhood of Railway and Airline Clerks and the United Transportation

[4]The losses totalled $103.4 million. *See* Response of Intervenors' Crown, et al. to Trustee's Report for 1978 and Four Months 1979, at 30 (Sept. 6, 1979) (Supp. App. H-7).

[5]In the period from January 1, 1975 through September 30, 1979, the Rock Island incurred losses in excess of $178.4 million on an Interstate Commerce Commission ("Commission") accounting basis. *Id.*; Income Statement-1979 (Supp. App. G-15).

[6]*Id.*; ICC Directed Service Order No. 1398, Appendix A, 44 F.R. 56,343 at 56352-54 (1979).

Union, represented in these proceedings by the appellant RLEA, struck the Rock Island on August 28, 1979.[7] To end the strike, on September 20, 1979, the President of the United States appointed an Emergency Board pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, thereby mandating a return to work by the Rock Island employees.[8] Contrary to Judge McGarr's expectations[9], and in defiance of the Presidential order, the Rock Island employees did not return to work.

The strike quickly exhausted the already severely limited cash reserves of the Trustee. On September 26, 1979, the Interstate Commerce Commission ordered the Kansas City Terminal Railway Co. to operate and provide directed service over the lines of the Rock Island, based upon "the specific finding that [the Rock Island's] cash position makes its continuing operation impossible" and that the Rock Island "suffers from the type of 'cashlessness' described in 49 U.S.C. § 11125(a)(1)."[10] Since the date of the initial directed service order, the Rock Island has had no railroad operations.[11]

Liquidation and Abandonment

On January 25, 1980, based upon the Rock Island's long history of continuing losses, the conclusion of the court's own ex-

[7]The striking unions demanded the payment of retroactive wage increases before agreeing to even minimal work rules changes. The Trustee insisted upon the implementation of more efficient work rules and the elimination of costly featherbedding practices before he would (or, indeed, could) pay wage increases. Those wage increases would have cost the Rock Island estate $14 million—sums all sides knew to be unavailable to the Trustee. Report of Emergency Board No. 191 (October 22, 1979) (Supp. App. C).

[8]*Id.*

[9]Transcript of Proceedings, September 21, 1979, at 9-11 (Supp. App. A-4-6).

[10]Directed Service Order No. 1398, *supra* note 6.

[11]Some of the Rock Island's lines have been operated under Commission orders or Commission-sponsored lease arrangements.

pert,[12] and the urgings of the creditors and shareholders and the federal government, Judge McGarr found that "a continuation of the Rock Island on an income producing basis, whether in core or in whole or in part . . . is just not possible. . . ." Transcript of Proceedings, January 25, 1980, at 100. Judge McGarr thereupon ordered his Trustee to plan and commence the liquidation of the Rock Island. *Id.* at 97 (Supp. App. B-6).

The January 25, 1980 decision to liquidate the Rock Island was confirmed by the Commission and the reorganization court in their respective decisions pursuant to Section 1170 of the Bankruptcy Code, 11 U.S.C. § 1170, authorizing the total abandonment of Rock Island lines. On May 27, 1980, the Commission filed an advisory report with the reorganization court in which it concurred in the view that the Rock Island "has no realistic hope for reorganization or continued public service in its present form." *Chicago, Rock Island & Pacific Railroad Co.—Abandonment,* Interstate Commerce Commission Report, Docket AB-46 (Sub-No. 22) (May 27, 1980), at 4 (Supp. App. I-4). The Commission referred to a long line of cases in which it had refused to impose employee protection conditions on total line abandonments, and declined to recommend that the reorganization court impose such conditions on the Rock Island's abandonment. *Id.* at 16-17 (Supp. App. I-16-17).

On precisely the terms recommended by the Commission, on June 2, 1980, Judge McGarr confirmed the total abandonment of all Rock Island lines and service. Judge McGarr found:

> that Rock Island's unconditional discontinuance of service and its total system abandonment is constitutionally mandated and . . . that to force a railroad to continue operations indefinitely at a loss in order that the public may be served is a violation of the Fifth Amendment rights of those who have a security interest in the enterprise. *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U.S. 396 (1920).

[12]On January 21, 1980, Peat, Marwick, Mitchell & Co., the court's expert, filed its report, which concluded that the Rock Island was not reorganizable even if pared to its most profitable core. Report of Peat, Marwick, Mitchell & Co., at X-1 through X-16 (January 21, 1980).

Judge McGarr also found:

> [C]onsistent with ICC precedent, with the Rock Island's constitutional right to abandon its lines and discontinue its service, and with the equities of the Rock Island situation, no labor protection arrangements may be imposed on the Rock Island estate. . . .

Order No. 248 (June 2, 1980).[13]

The Rock Island Act

Thus, the district court which had presided over the Rock Island's reorganization proceedings for almost five years had concluded that the Rock Island must be liquidated and was therefore entitled to withdraw from the universe of publicly regulated industries without any labor protection conditions. Despite the court's finding, Congress decided to impose upon the Rock Island the cost of a new "protection" scheme for its former employees. Sections 106 and 110 of the Rock Island Transaction and Employee Assistance Act, 45 U.S.C. § 1001, *et seq.*, signed by the President on May 30, 1980, imposed $75,000,000 in new employee protection obligations on the Rock Island estate. App. A, *infra.* Whether the program is funded directly from the assets of the estate or by federally guaranteed loans under Section 110, the Act mandates that the reorganization court accord cost of administration status to the labor protection arrangements imposed by the Interstate Commerce Commission under the statute.

After extensive argument, on June 9, 1980 Judge McGarr found an "exceedingly great" probability that the Act would work an unconstitutional taking of the property of the Rock Island and deprive the Rock Island estate of due process of law in

[13]The RLEA subsequently twice sought a stay of that order from the Seventh Circuit Court of Appeals. On each occasion that court denied RLEA's request. *In re Chicago, R. I. & P. R. R.*, No. 80-1788 (7th Cir. June 19 and Sept. 18, 1980) (unpublished orders denying stay applications).

violation of the fifth amendment to the United States Constitution by its summary imposition of a new $75,000,000 labor protection claim on the Rock Island estate to serve its purported public purposes. Transcript of Proceedings, June 9, 1980, at 81 (App. C, *infra,* at c-6). Accordingly, Judge McGarr enjoined the implementation of the Rock Island Act's labor protection scheme to prevent irreparable injury to the Rock Island estate, to maintain the status quo and to preserve the assets of the estate pending judicial review. On June 11, 1980, the RLEA took this appeal from that order under 28 U.S.C. § 1252.[14]

On June 28, 1980, Justice Stevens, as Circuit Justice for the Seventh Circuit, denied the RLEA's application for a stay of the district court's order and indicated his preliminary agreement with the district court's conclusion as to the unconstitutionality of the Rock Island Act:

> [H]aving read the parties' submissions, I am now of the opinion that Judge McGarr was probably correct in concluding that the Act authorizes an unconstitutional taking of property of the estate. It appears to direct a transfer of $75 million off the top of the estate's assets to the employees. While such a transfer might be permissible in the course of a genuine reorganization, at least as of this moment, I have difficulty perceiving how, in the context of a liquidation, this is anything other than a simple taking of the property of the general creditors, as the trustee argues.

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[14]On June 20, 1980, Judge McGarr heard the motion to reconsider his June 9 order which was filed by the United States and the Interstate Commerce Commission and joined by the RLEA. Judge McGarr denied the motion to reconsider on June 20, 1980.

On June 28, 1980, the United States, the Interstate Commerce Commission and the Secretary of Transportation filed a notice of appeal to this Court under 28 U.S.C. § 1252, of the June 9, 1980 order and the June 20, 1980 denial of the motion to reconsider. *United States* v. *Gibbons,* No. A-185 (U.S., *appeal filed* June 28, 1980). The government did not timely docket its appeal.

The RLEA never filed a notice of appeal of the June 20, 1980 denial of the motion to reconsider, nor did it ever file another notice of appeal of the June 9, 1980 injunction, although it had expressly joined the June 20 motion to reconsider.

RLEA v. *Gibbons, supra* note 1, 100 S. Ct. at 2671. This Court subsequently sustained Justice Stevens' denial of the stay motion. *Id.*, 100 S. Ct. at 3057. On September 15, 1980, the appellant RLEA filed its jurisdictional statement regarding this appeal.

The Staggers Rail Act of 1980

Displeased with these judicial efforts to protect the Rock Island estate, in September 1980, Congress passed amendments to the original Rock Island Act as part of the Staggers Rail Act of 1980, Pub. L. No. 96-448 (October 14, 1980) (App. B, *infra*). As amended by the Staggers Rail Act, the Rock Island Act still provides for the taking of $75,000,000 from the bankrupt Rock Island estate to fund its labor protection scheme, and requires that the program be accorded cost of administration status.[15] Section 124(c), as amended, provides that "nothing in this Act shall limit the right of any party to commence an action under . . . the Tucker Act." Section 124 of the Staggers Rail Act amendments contains extraordinary provisions limiting judicial review.

Based upon these amendments to the original Rock Island Act, on October 7, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Act unconstitutional. On October 15, 1980, after the submission of briefs and oral argument, Judge McGarr refused to vacate his earlier order and ruled that his earlier injunction would remain in effect. He found:

> This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various

[15]The period during which the Trustee and labor unions are permitted to "negotiate" an agreement is reduced from ten to five days. Failing a "voluntary" agreement, the time within which the Commission is required to "impose" a labor protection arrangement is reduced from 30 to 15 days. The Staggers Rail Act eliminated Section 106(d)(1) of the original Act, which precluded any judicial stay of a Commission order imposing labor protection under the Act, and the last sentence of Section 106(d)(2) of the original Act, which purported to preclude review by the Supreme Court.

> parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. *The Staggers Rail Act does not cure the defects found in the Rock Island Act.* Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

(Emphasis supplied.) Order of October 15, 1980, at 3-4, App. G, *infra* at g-3. *See also* Transcript of Proceedings, October 7, 1980, App. F, *infra*, at f-2-3.

Although this appeal from Judge McGarr's June 9 injunction remained pending in this Court, the RLEA appealed from Judge McGarr's denial of its motion to vacate that injunction to the United States Court of Appeals for the Seventh Circuit. On October 29, 1980 the government followed suit.

On November 13, 1980, the court of appeals, sitting *en banc*, heard oral argument on the appeals of the RLEA, the United States and the Interstate Commerce Commission from Judge McGarr's order of October 15, 1980. *In re Chicago, R. I. & P. R.R.*, *supra* note 2. The procedural amendments of the Staggers Rail Act, with which the court of appeals has complied thus far, require that court to render its final decision on those appeals by December 28, 1980.

ARGUMENT

I.

THE DISTRICT COURT'S DETERMINATION THAT THE ROCK ISLAND ACT'S EMPLOYEE PROTECTION PROVISIONS COMMIT A TAKING OF THE ROCK ISLAND ESTATE'S PROPERTY AND DEPRIVATION OF ITS DUE PROCESS RIGHTS IN VIOLATION OF THE FIFTH AMENDMENT WAS MANIFESTLY CORRECT.

Under the terms of Sections 106 and 110 of the Rock Island Act, in its original form and as amended by the Staggers Rail Act, a taking of the property of the Rock Island estate to fund the

Rock Island Act's employee protection scheme must occur, whether funded directly from the assets of the estate or through an enforced federal loan under Section 110. Because the Act accords expense of administration status to these obligations, they will be payable prior to the interests of the estate's shareholders and unsecured creditors, and may be payable prior to the amounts owed to secured creditors and trade creditors with cost of administration status. Without question, as Judge McGarr found, the Act's employee protection scheme would dilute the value of the estate's assets and reduce the amount available to discharge its existing debts by $75,000,000.

A. The Rock Island—A Moribund Railroad Declared Cashless, Abandoned and Unreorganizable—May Not Be Required To Use Its Funds In The Public Interest.

In Section 102 of the Rock Island Act, Congress declared that protection of former Rock Island employees is essential to achieve the public purpose of continued rail operations, which it considers necessary to the economies of the region formerly served by the Rock Island. However, Congress is seeking to achieve this public purpose and support continued rail operations by imposing a $75,000,000 burden on the Rock Island estate.

Railroads may be required to continue operations at a loss for a reasonable period and to suffer diminution in their property values to serve legitimate governmental interests in maintaining the national transportation system. Nevertheless, this permissible governmental interference with private interests is limited by the fifth amendment. *Regional Rail Reorganization Act Cases ("3R Act Cases")*, 419 U.S. 102, 120 (1974).

In *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 399 (1920), Justice Holmes stated the governing principle:

> A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage . . . If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss.

This principle was recently reaffirmed by the Court of Appeals for the Seventh Circuit, which held in connection with the embargo orders and related borrowings by the Milwaukee Road that it is "settled that a railroad that is cashless cannot be required to continue operating to serve the public interest." *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 611 F.2d 662, 669 ("*Milwaukee Embargo*") (7th Cir. 1979).[16] In *In re Central Railroad Company of New Jersey*, 485 F.2d 208, 213 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974), the court of appeals stated "the basic principle that an owner of property retains the right ultimately to withdraw that property from a losing venture. Indeed, such a right appears to be a fundament of the taking provision."

The cases in which additional priority debts or impairments of existing property rights for continued operations have been imposed on bankrupt railroads have been consistently limited to instances where there remained some hope of an income based reorganization. In the *3R Act Cases*, this Court stated that the general *Brooks-Scanlon* rule

> is qualified by the requirement that a railroad estate suffer *interim* losses for a *reasonable period pending good-faith efforts to develop a feasible reorganization plan* if the public interest in continued rail service justifies the requirement.

419 U.S. at 122-123 (emphasis supplied; citation omitted).[17]

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[16] *Accord, Bullock* v. *Railroad Commission*, 254 U.S. 513 (1921); *Railroad Commission* v. *Eastern Texas R.R.*, 264 U.S. 79, 85 (1924); *In re Penn Central Transp. Co.*, 384 F.Supp. 895, 918-19 (Special Ct. 1974); *Valuation Proceedings*, 439 F.Supp. 1351 (Special Ct. 1977); *In re Penn Central Transp. Co.*, 382 F.Supp. 856, 868 (E.D. Pa. 1974).

[17] Earlier in the current Rock Island reorganization proceedings, Judge McGarr approved, and the Seventh Circuit upheld, a priority borrowing by the Trustee to support continued deficit operations of the Rock Island, even though that borrowing would for a time displace the interests of the estate's creditors. The borrowing was justified on the ground that it would preserve the ultimate possibility of a successful

(*footnote continued on following page*)

The *Brooks-Scanlon* line of cases and the cases where debts have been imposed to continue operations pending reorganization clearly hold that where a railroad is cashless and not reorganizable, its right to cease operations is protected by the fifth amendment and is consistent with the public interest in all its aspects. Here, the district court found that reorganization of the Rock Island is impossible. Thus, the limited period during which Rock Island investors can be assumed to have agreed to commit the estate's resources to the public's transportation needs is long past, and can be extended no further consistently with the fifth amendment. Since the Rock Island cannot any longer be required to continue to devote its resources to further the national transportation policy, *a fortiori* it cannot be required to further a component of that policy through new employee protection obligations. Now that reorganization of the Rock Island is impossible, the imposition of any priority borrowing on this estate to fund the Rock Island Act's labor protection program is impermissible. The harm to the Rock Island's creditors and shareholders through the Rock Island Act's imposition of a new $75,000,000 expense of administration is certain and actual.

B. If The Government Believes That The Public Interest Requires Protection For Former Rock Island Employees, Then The Government Must Pay For It.

It is unfortunate that the former employees of the Rock Island have lost their means of livelihood in the course of the estate's cessation of railroad operations. However, because a reorganization

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income-based reorganization, in which the creditors would receive full satisfaction of their claims. *In re Chicago, R.I. & P. R.R.*, 545 F.2d 1087 (7th Cir. 1976). *See, e.g., Continental Illinois Nat'l Bank and Trust Co. v. Chicago, R. I. & P. R.R.*, 294 U.S. 648 (1935); *Milwaukee Embargo, supra*, 611 F.2d at 666. Now that Judge McGarr and the Commission have ruled that there is no possibility of reorganization of the Rock Island as an ongoing rail entity, this line of cases furnishes no justification for the attempted taking of the Rock Island's property.

of the Rock Island as an operating carrier is now impossible, the imposition of any priority borrowing on this estate to fund the public purpose of the Rock Island Act's labor protection program is impermissible. If, as the RLEA and the government have argued, the Rock Island Act labor protection program is necessary to further national transportation policies, the fifth amendment principle relied upon in *Brooks-Scanlon* and its progeny requires that the government, and not the bankrupt Rock Island estate, must pay the cost of the public benefit.

Justice Holmes stated the general principle limiting governmental regulation which underlies the *Brooks-Scanlon* holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922):

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. . . . *In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*

(Citations omitted; emphasis supplied.)[18] Thus, the cost of supporting former Rock Island employees may not be charged to the

[18] In *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935), this Court concluded that the Frazier-Lemke Act was unconstitutional because it deprived creditors of their rights in specific property held as security despite the grave emergency caused by the Great Depression which confronted the nation's farmers. Justice Brandeis declared:

> "*[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation.* If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, *the burden of the relief afforded in the public interest may be borne by the public.*"

295 U.S. at 602 (emphasis supplied).

bankrupt estate of their former employer without governmental compensation which is "a full and perfect equivalent for the property taken." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893); *United States* v. *Reynolds*, 397 U.S. 14, 16 (1970).

C. The Rock Island Had No Existing Labor Protection Obligation. Therefore, The Rock Island Act Can Confer No Benefit On The Rock Island Estate.

The Interstate Commerce Commission has consistently declined to impose labor protection conditions in situations involving the abandonment of a railroad's entire line.[19] In *Okmulgee Northern Railway Abandonment*, 320 I.C.C. 637, 645 (1964), the Commission stated that to impose labor protection conditions in total line abandonments "would not serve, in most instances, to strengthen the transportation system . . . ."

In *Tennessee Central Railway Co. Abandonment*, 333 I.C.C. 443, 453-54 (1968), the Commission approved the total abandonment of the railroad, after years of operating losses and consumption of the railroad's property to offset those losses. The Tennessee Central had no hope of survival as a going concern. Given this history, the Commission concluded that "it was neither equitable nor warranted . . . to require further consumption of the railroad properties for the payment of employees after the railroad ceases operation." 333 I.C.C. at 454.

The Commission reaffirmed its general policy to decline to impose labor protection conditions on total line abandonments in its

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[19] *Montpelier & Barre R.R. Abandonment*, Dkt. No. AB-202 F (I.C.C. Feb. 6, 1980); *Northampton & Bath R.R. Abandonment*, 354 I.C.C. 784, 785-86 (1978); *Wellsville, Addison & Galeton R.R. Abandonment*, 354 I.C.C. 744, 746 (1978); *Rutland Rwy. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom. Brotherhood of Locomotive Engineers* v. *United States*, 217 F. Supp. 98 (N.D. Ohio 1963); *Chicago, Attica & Southern Carolina Rwy. Abandonment*, 261 I.C.C. 646 (1946); *East Carolina Rwy. Abandonment*, 324 I.C.C. 506 (1964).

advisory report to the Reorganization Court on May 27, 1980. (Supp. App. I-16-17.) This unbroken line of Commission precedents and the constitutional principles of *Brooks-Scanlon, supra*, underlie the reorganization court's finding of June 2, 1980, that to require the payment of further labor protection obligations in connection with the abandonment of Rock Island lines would be constitutionally impermissible and equitably unwarranted. Transcript of Proceedings, June 2, 1980, at 62-63.

As the reorganization court recognized in its ruling of June 9, 1980, no benefit to the estate can be implied from those provisions of the Act that purport to substitute a new form of labor protection for any existing labor protection, because no further labor protection obligations may constitutionally be imposed on this estate, whether their purpose is to further the national transportation policy or not. Thus, the Rock Island Act cannot be said to have "quantified" an existing obligation of the Rock Island estate. Rather, the Rock Island Act employee protection obligations are wholly new obligations imposed retroactively on the bankrupt estate, to the inevitable detriment of the estate and its creditors and shareholders.[20]

[20]Judge McGarr noted the clear difference between the Milwaukee Road and the Rock Island situations in the hearing of June 9, 1980 on the motion for a declaratory judgment and preliminary injunction:

> "I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in."

Transcript of Proceedings, June 9, 1980, at 77. App. C, *infra*, at c-3.

Similarly, in his opinion denying the RLEA's request for a stay of the June 9 injunction, Justice Stevens noted "that the 'Milwaukee bill' concerned a genuine railroad reorganization, not a liquidation." *RLEA* v. *Gibbons, supra* note 1, 100 S.Ct. at 2670, n.1.

II.

THE ROCK ISLAND ACT PLAINLY VIOLATES THE CONSTITUTIONAL PRINCIPLES OF DUE PROCESS, SEPARATION OF POWERS AND EQUAL PROTECTION.

A. The Rock Island Act Violates The Separation Of Powers Doctrine By Directing The Reorganization Court To Impose *Any* Labor Protection Arrangement Ordered By The Commission.

The separation of powers doctrine dictates that Congress cannot use its general power to allocate judicial responsibility to prescribe a rule of decision in a pending case. Congress may not extend a particular jurisdictional grant and at the same time direct the courts as to the content of their decision-making process. *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Moreover, Congress cannot single out a particular court and retract that court's jurisdiction. *See, e.g., Glidden Co.* v. *Zdanok*, 370 U.S. 530, 568 (1962).[21]

Section 77(a) of the Bankruptcy Act, 11 U.S.C. § 205(a), specifically provides that the reorganization court has "exclusive jurisdiction of the debtor and its property wherever located. . . ." *New Haven Inclusion Cases*, 399 U.S. 392, 420 (1970). Section 106(c) of the Rock Island Act directs the reorganization court to "immediately authorize and direct the Rock Island Railroad Trustee to . . . immediately implement an arrangement [imposed by the Commission]." This grant of authority to the Commission, an agency by definition expert only in railroad operations, to direct the imposition of a debt on a bankrupt entity no longer involved in rail operations, clearly invades the exclusive jurisdiction of the reorganization court to administer the assets of the bankrupt estate and to adjudicate the claims thereto.

[21]This basic principle, which precludes Congressional interference in pending proceedings, was applied in a pending bankruptcy proceeding in 1881. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881).

B. The Rock Island Act Further Violates The Due Process And Separation Of Powers Principles By Its Extraordinary Curtailment Of Appellate Review.

The Staggers Rail Act amendments to Section 124 of the Rock Island Act impose extraordinary new limitations on appellate review. App. B, *infra.* They thus compound—rather than cure, as the government suggests—the constitutional defects of the original Rock Island Act.

Rather than permitting rational review of the Rock Island Act to go forward, the unusual procedure required by Section 124 of the amended Rock Island Act seeks to strip this Court of jurisdiction over a case already pending before it under 28 U.S.C. § 1252. Section 124 appears to require the court of appeals to assume jurisdiction to review the subsidiary order of October 15, 1980 in a piecemeal fashion. If this provision was intended to strip this Court of its jurisdiction over a pending case, because the denials by Justice Stevens and this Court of the RLEA's stay motion reflected this Court's preliminary view that the Rock Island Act is unconstitutional, the provision clearly violates the principles of *United States* v. *Klein, supra.*

The sum effect of this extraordinary Congressional interference with pending litigation has resulted in the procedural confusion surrounding these proceedings. The inevitable result is a further infringement of the constitutional rights of the Rock Island estate.[22]

C. The Rock Island Act Unconstitutionally Singles Out the Rock Island.

The unconstitutionality of the Rock Island Act labor protection scheme as a taking and deprivation of property is accentuated by

[22]The proceedings before the court of appeals were replete with procedural unfairness to the Rock Island estate. The extraordinary requirements of Section 124(b) of the Staggers Rail Act amendments that those appeals be heard in an *en banc* proceeding, and determined within 60 days of the date the last appeal was filed (exacerbated

(*Footnote continued on following page*)

the fact that the Act singles out only one company upon which to impose its new obligations. By singling out the Rock Island from all other companies and railroads in reorganization and imposing on it special, unprecedented burdens, the Rock Island Act clearly offends the due process and equal protection clauses of the fifth amendment.

The presumption of validity which this court has applied to laws involving general "socioeconomic" regulation has not served to sustain acts such as the Rock Island legislation, which are "not even purportedly enacted to deal with a broad, generalized economic or social problem." *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 235 (1978). This is especially so where the liability imposed is "a sudden, totally unanticipated, and substantial retroactive obligation upon the company to its employees. . . ." 438 U.S. at 249. *See also Railroad Retirement Board* v. *Alton Railroad Co.*, 295 U.S. 330, 349-50 (1935).

Moreover, by imposing only upon the Rock Island extraordinary retroactive labor protection burdens, the Rock Island Act's

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by the tardy filing of briefs by all the appellants), resulted in an inadequate period for briefing and argument of those appeals, including the preliminary matters to be addressed.

Section 124(b) of the amended Rock Island Act appeared to require that the proceeding in the court of appeals be consolidated with the pending appeal concerning the unrelated Milwaukee Road Restructuring Act labor protection scheme. The parties to the Milwaukee Road appeal sought to dismiss that appeal the day of oral argument, over the objections of the United States and the Commission. That dismissal was granted on December 3, 1980. Nevertheless, the appeal was fully briefed, and the Milwaukee Road Trustee participated in the Rock Island Act appeal as an adversary to the Trustee, creditors and shareholders. Participation in the Seventh Circuit appeals by the Milwaukee Road Trustee forced the Rock Island Trustee, creditors and shareholders to confront the Milwaukee Road Trustee as an adversary, although the Milwaukee Road case is wholly unrelated to the Rock Island situation, and the parties in the Milwaukee Road appeal did not participate in the proceedings before the Rock Island reorganization court.

labor protection scheme penalizes the Rock Island for exercising its constitutional right to withdraw from losing railroad operations. By doing so, it resembles the type of special punitive legislation which the constitutional prohibition against bills of attainder was designed to prevent.[23] Thus, the Rock Island Act manifestly constitutes a particularized confiscation rather than legitimate regulation.

D. The Rock Island Act Violates The Constitutional Requirement That Bankruptcy Laws Be Uniform.

Article I, Section 8, clause 4 of the United States Constitution requires that legislation "on the subject of bankruptcies" must apply equally to all similar bankruptcies throughout the country.[24] *Hanover National Bank* v. *Moyses*, 186 U.S. 181, 188 (1902).

In *In re Sink*, 27 F.2d 361 (W.D. Va. 1928), *appeal dismissed*, 30 F.2d 1019 (4th Cir. 1929), a law dealing with a single bankrupt and authorizing action by a single federal district court was

[23]Bills of attainder are:

> "[l]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. . . ."

United States v. *Lovett*, 328 U.S. 303, 315 (1946). *See also United States* v. *Brown*, 381 U.S. 437 (1965); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 475 (1977).

[24]The Supreme Court, in *Continental Illinois Nat'l Bank and Trust Co.* v. *Chicago, R. I. & P. R.R.*, 294 U.S. 648, 673 (1935), stated that the "subject of bankruptcies" involves:

> "nothing less than 'the subject of the relations between an insolvent or non-paying or fraudulent debtor, and his creditors, extending to his and their relief.' "

(Citations omitted.) The Rock Island Act is certainly bankruptcy legislation subject to the uniformity clause, because it involves the priority and use of government loans, the imposition of new debt on the debtor's estate, and the treatment of labor protection claims.

invalidated as a violation of the uniformity clause. The *Sink* court declared that "a statute which applies to only one bankruptcy is as far from being uniform as is possible." 27 F.2d at 361.

In the *3R Act Cases, supra*, this Court upheld the Regional Rail Reorganization Act of 1973 against a non-uniformity challenge. The Court found that although on its face the 3R Act applied to railroad reorganizations in only a single, statutorily defined region, nationwide geographic uniformity was *de facto* present under the 3R Act. 419 U.S. at 159-160.[25]

Unlike the 3R Act, and like the statute addressed in *Sink*, the Rock Island Act is explicitly tailored and applicable to only one rail carrier in the process of reorganization and liquidation at a time when other Section 77 reorganizations pend in the same judicial district and elsewhere. The *de facto* geographic uniformity which insulated the 3R Act from the effect of the uniformity clause cannot justify the non-uniformity of the Rock Island Act.

III.

THE POSSIBILITY OF A LATER TUCKER ACT REMEDY CANNOT JUSTIFY OTHERWISE UNCONSTITUTIONAL GOVERNMENTAL ACTS

The new section 124(c) of the amended Rock Island Act states that the statute does not limit any right to bring a subsequent suit under the Tucker Act, should the labor protection provisions of

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[25]This Court stated:

> "The argument that the Rail Act differs from the head tax statute because by its own terms the Rail Act applies only to one designated region is without merit. The definition of the region does not obscure the reality that the legislation applies to all railroads under reorganization pursuant to §77 during the time the Act applies."

419 U.S. at 161. It thus shared the view expressed by Judge Friendly in his opinion for the Special Court. *In the Matter of Penn Central Transp. Co.*, 384 F. Supp. 895, 916 (Special Ct., 1974).

the Act prove to be unconstitutional.[26] The federal appellees rely primarily on this amendment to argue that the constitutional questions raised in this appeal are moot.

The government's contention is founded on the proposition that the Rock Island Act's clear violation of the Rock Island's fifth amendment property and due process rights may go forward if a later possibility of redress through a Tucker Act suit remains. This is the same premise that the RLEA and the government relied upon to support the motions of October 7, 1980 to vacate the injunction against the implementation of the Rock Island Act, and to argue in favor of the amended statute's validity before the court of appeals. It was found wholly inadequate by the district court on October 15, 1980, and is at the heart of the appeal now pending before the court of appeals. Indeed, as the district court properly found, this proposed reliance on a provision which does not bar a later uncertain remedy for the taking of the property of a bankrupt estate to authorize the prior commission of an otherwise unconstitutional act flies in the face of the most basic due process principles of our Constitution.[27]

A. The Availability And Adequacy Of The Tucker Act Remedy In The *3R Act Cases* Does Not Justify The Rock Island Act's Taking, Where Congress Has Refused To Acknowledge Any Liability, And Where The Taking Has Been Found To Be Unconstitutional.

The constitutional defects of the Rock Island Act cannot be cured by the oblique reference to the Tucker Act in the Staggers

[26]Section 701(a)(1) of the Staggers Rail Act of 1980, which amends Section 124(c) of the Rock Island Act provides:

> "Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901, *et seq.*) shall limit the right of any person to commence an action in the Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

[27]*See, e.g. Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *see also* Transcript Of Proceedings, October 7, 1980, App. F, *infra*, at f-2-3; Brief of the Trustee and Creditors at 54-55, November 10, 1980 (Supp. App. F-67-68).

Rail Act. Apparently Congress relies on the *3R Act Cases, supra,* in concluding otherwise. *See* Joint Explanatory Statement of the Conference Committee, H.R.REP. NO. 1041, 96th Cong., 2d Sess. (1980), *reprinted in* 96 Cong. Rec. at H-9931 (daily ed. Sept. 29, 1980). App. B, *infra,* at b-5-6. This Congressional misapprehension that the Tucker Act provides a cure can be derived only from a superficial reading of the *3R Act Cases* opinion.

The Regional Rail Reorganization Act of 1973, 45 U.S.C. §701, *et seq.* (the "3R Act") established a new entity, known as Conrail, to own and operate the bankrupt railroads of the Northeast. The Act required the private owners of the bankrupt railroads immediately to convey their property interests to Conrail, taking in exchange Conrail securities and federally guaranteed United States Railway Association obligations funded by an immediate grant of $500,000,000. In addition to this grant, one billion dollars was appropriated to fund the rehabilitation and reorganization of the new rail entity. The new entity was thus initially funded with all the assets of the former private railroads, as well as federal funds in the amount of $1.5 billion.

In adjudicating the constitutionality of the 3R Act, this Court in the *3R Act Cases* made it plain that the validity of the 3R Act plan rested on its provision for full and adequate compensation to creditors. Justice Brennan stated:

> Congress has not formulated an unconstitutional reorganization plan in compelling a reorganization wherein the compensation to appellees consists of Conrail and USRA securities and other benefits 'so long as the creditor gets all the value of his lien and his share of any free assets.' *RFC* v. *Denver & R.G.W.R. Co.* [328 U.S. 495, 533].

419 U.S. at 154-55.

This Court explained the Congressional failure to mention the availability of a Tucker Act remedy in the Conrail scheme as follows:

> Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims.

419 U.S. at 128. This inference affirmed the reading of legislative history and Congressional intent in the decision of Judge Friendly, from which the appeal was taken, *In re Penn Central Transportation Co.*, 384 F.Supp. 895, 941, *et seq.* (Special Ct. 1974). Thus, in the *3R Act Cases, supra,* both the Congress and the Supreme Court acknowledged that compensation was owed to the Penn Central for the taking of its property, prior to the taking.

The 3R Act plan was necessary to accomplish the goal of reorganizing the railroads of the Northeast. The government took specific rail properties needed to form the new government-owned rail corporation. Like "quick-taking" condemnation proceedings,[28] the 3R Act provided an immediate payment for Northeast rail properties for which the government had an emergent need, with the promise of a more extended valuation proceeding to ensure just compensation.

The Rock Island Act's taking of $75,000,000 of the Rock Island's property in cash, the value of which is immediately known, is sharply different from the conveyance of specific rail properties of unknown value to establish the Conrail entity. Here, Congress is not taking unique rail property needed for public use.[29] Rather, it is requiring the expenditure of the Rock Island's private funds to achieve a perceived public purpose, which Congress could, if it chose to do so, fund directly.

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[28] *See, e.g.*, ILL. REV. STAT. ch. 47, §2.2 (1979).

[29] The government cannot claim that it has an emergent need for the cash of a bankrupt railroad.

In the 3R Act conveyance to Conrail, Congress conceded the liability of the United States in the statutory scheme. Congress appropriated a total of $1.5 billion in the 3R Act to assure compensation, with the Tucker Act remedy available should any shortfall occur. Thus, the only question presented in the *3R Act Cases* was not whether there would be any compensation by the Government, but whether the amount of compensation made available would ultimately be adequate. By contrast, Congress has declined to appropriate a penny to cover the cost of the Rock Island Act employee protection scheme. In the case of the Rock Island, Congress steadfastly refuses to concede any possible liability.

B. The Bare Statement That Tucker Act Jurisdiction Is Not Precluded Cannot Compensate The Rock Island For the Loss Of Its Fifth Amendment Rights, Or Alleviate The Act's Irreparable Injury To The Estate.

The inherent limitations of the Tucker Act make apparent the constitutional impropriety of its use to warrant a prospective taking of the Rock Island's property, as the government and the RLEA have proposed. This Court has stated that "[t]he Tucker Act . . . is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan*, 424 U.S. 392, 398 (1976).

Moreover, a Tucker Act remedy requires a clear acknowledgment of federal liability. *United States* v. *Testan, supra*, 424 U.S. at 400-01; *Whiskers* v. *United States*, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 100 S. Ct. 1028 (1980). Unlike the 3R Act, the Rock Island Act contains no clear acknowledgment or indication that the Government intends to pay the $75,000,000 cost of the Act's labor protection scheme. The Tucker Act is intended to remedy only certain governmental wrongs which have already

occurred. The Tucker Act provision in the Rock Island Act amendments, however, is sought to be used as a device to warrant *future* takings of private property.

In its June 9, 1980 grant of a preliminary injunction, the Rock Island Reorganization Court noted the clearly disclosed Congressional intention not to compensate the Rock Island estate for sums expended under the original Rock Island Act. This reading was confirmed by Justice Stevens in his opinion denying the RLEA's application for a stay of the injunction. *RLEA* v. *Gibbons, supra,* 100 S. Ct. at 2670, n.1.

The amended Rock Island Act's oblique reference to the possible commencement of a later suit under the Tucker Act indicates no Congressional intent to bear the cost of the Rock Island Act's labor protection scheme. Moreover, neither the Rock Island Act amendments nor their legislative history disclose any Congressional intention to repudiate its initial denial of federal compensation for the cost of the program. The only legislative comment concerning funding of Rock Island employee protection in the Staggers Rail Act appears in the Conference Committee's Joint Explanatory Statement:

> Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

H.R. REP. NO. 1041, *supra*, 96 Cong.Rec. H-9931. App. B, *infra*, at b-6.

This language indicates no Congressional admission of liability for the employee protection scheme established under the Act.

Rather, it indicates once again Congressional intent to go forward with the scheme, and to deny compensation to the Rock Island regardless of the clear unconstitutionality of the Rock Island Act.

In his order of October 5, 1980, refusing to vacate his outstanding injunction, Judge McGarr concluded that the Staggers Rail Act's mere reference to a possible later Tucker Act remedy did not alter the irreparable harm which would be suffered by the Rock Island estate. He stated:

> Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

App. G, *infra*, at g-3.

Therefore, Judge McGarr, who has presided over the Rock Island's reorganization and liquidation for five years, continued in effect the injunction issued to protect a bankrupt estate from irreparable injury through the operation of a statutory scheme which he considered clearly unconstitutional. Judge McGarr was manifestly correct in this finding of no change in the effect of the Rock Island Act on the Rock Island estate by the superficial addition of an uncertain possibility of a later remedy.

V

THE QUESTIONS RAISED IN THIS APPEAL ARE NOT MOOTED BY THE STAGGERS RAIL ACT OR THE APPEAL OF JUDGE McGARR'S OCTOBER 15, 1980 ORDER TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

In their response to the RLEA's jurisdictional statement in this appeal, the federal appellees contend that this appeal is moot, because the enactment of the "new" Staggers Rail Act amendments has repealed the Rock Island Act, to replace it with a wholly new statutory scheme for review by the courts.

In its argument that this appeal is moot, the government relies upon the statement in *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 116 (1920) that "[w]here by an act of the parties or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated accordingly." Here, there is no question that the "existing controversy" between the parties has not "come to an end" by virtue of the Staggers Rail Act amendments.

On October 7, 1980, Judge McGarr expressly stated:

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and remains subject to the same injunction.

Transcript of Proceedings, October 7, 1980, at 31-32. App. F, *infra*, at f-3. The government's contention overlooks the clear effect and meaning of the Rock Island Act amendments, as recognized by Judge McGarr.

In *Alaska Steamship, supra*, the passage of the subsequent statute made it "apparent that the complainants do not now need an

injunction. . . ." 253 U.S. at 116. Here, by contrast, Judge McGarr properly concluded that the existing injunction was still necessary to protect the Rock Island estate from the irreparable injury that would result from the implementation of the same Rock Island Act scheme, as reenacted by the Staggers Rail Act amendments. This Court should, as Judge McGarr properly did, look to the actual effect of the statute, as amended, to determine whether this appeal is moot.[30]

For this Court to grant the federal appellees' request to determine that this appeal is moot would be implicitly to reverse the trial court's determination as to the effect of the Staggers Rail Act amendments. Moreover, for this Court to determine that this appeal is moot on the basis of the reenactment with no substantive changes—but new provisions for judicial review—of a statute once declared unconstitutional, would be to permit blatant Congressional forum-shopping and would affront the policies against piecemeal appellate review of 28 U.S.C. §1252.

Thus, whatever the determination of the court of appeals as to the effect of the Staggers Rail Act amendments, the questions concerning the constitutionality of the basic Rock Island Act employee protection scheme, which was reenacted without substantial change in the Staggers Rail Act, remain ripe for determination by this Court.

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[30]In *Zablocki* v. *Redhail*, 434 U.S. 374, 382 n. 9 (1978), also cited by the federal appellees, this Court decided an appeal from a Wisconsin statute, although the Wisconsin legislature had passed a somewhat narrower "stopgap" statute while the appeal was pending, where the old, unconstitutional statute would go back into effect if the injunction was lifted. This Court should, as it did in *Zablocki*, decide the appeal despite the enactment of a subsequent statute which does not alter the unconstitutional statutory scheme.

CONCLUSION

For the foregoing reasons, appellees respectfully request that this Court note probable jurisdiction of this appeal and affirm the district court's order of June 9, 1980.

Respectfully submitted,

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December 17, 1980

APPENDIX A

EXCERPTS FROM THE ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT

EMPLOYEE PROTECTION AGREEMENTS

Sec. 106 (a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employee of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy

court shall immediately authorize and direct the Rock Island Railroad trustee to, and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d) (1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof, "the Milwaukee Railroad Restructuring Acts, and the Rock Island Railroad Transition and Employee Assistance Act."

* * *

OBLIGATION GUARANTEES

Sec. 110. (a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX B

EXCERPTS FROM THE CONFERENCE REPORT ON THE RAILROAD TRANSPORTATION POLICY ACT OF 1980 (AMENDMENTS TO THE ROCK ISLAND ACT)

TITLE VII—MISCELLANEOUS PROVISIONS
Rock Island and Milwaukee Railroads Amendments

Sec. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"*Judicial Review*

"Sec. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any

person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability"

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"*Employee Protection Agreements*

"Sec. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with

respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock

Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

(2) Section 108(a) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1007(a)) is amended by inserting immediately before the period at the end thereof the following: "(other than as provided in the agreement entered into in Washington, District of Columbia, on March 4, 1980, entitled 'Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association')."

(3) Section 103(5) of the Rock Island Railroad Transition and Employees Assistance Act (45 U.S.C. 1002(5)) is amended by inserting immediately before the period at the end thereof the following: "the estate of such Company in its reorganization proceeding, or the trustee appointed in such proceeding".

* * *

JOINT EXPLANATORY STATEMENT OF THE CONFERENCE COMMITTEE

Section 701—Rock Island and Milwaukee Railroads [A]mendments

Senate bill. No provision.

House amendment. The House amends the Rock Island Transition and Employee Assistance Act and the Milwaukee Railroad Restructuring Act in several instances. The Amendment provides that any decision with respect to constitutionality of the Rock Island Transition Act or the Milwaukee Railroad Restructuring Act from the respective courts having jurisdiction over the respective railroads in bankruptcy shall be taken to the United States Court of Appeals for the Seventh Circuit. If a constitutional challenge is made to the procedure under this provision, the challenge shall be heard by the United States Court of Appeals for the Seventh Circuit because the procedure is part of the Rock Island Transition Act. Should the appeals on constitutionality involve section 106 or section 110 of the Rock Island Transition Act or sections 9 or 15 of the Milwaukee Railroad Restructuring Act, regarding the claim of administration for employee protection claims, the court shall determine the appeals in a consolidated proceeding and render a final decision no later than 60 days after the last such appeal is filed.

The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge [Mc]Garr's injunction of the Rock Island Transition Act, Justice Stevens

expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, _____ U.S. _____ (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

The House amendment provides for a new schedule for the negotiation of an employee protection agreement between the Rock Island Railroad and the Labor organizations. If these parties are not able to come to an agreement within 5 days, the Commission is to impose a fair and equitable arrangement no less protective of the interests of employees than the protection established under section 9 of the Milwaukee Railroad Restructuring Act within 15 days after the enactment of the Staggers Rail Act. The bankruptcy court shall order the Rock Island Trustee and the Rock Island employee organizations to implement such arrangement immediately. Any order of the Commission or the bankruptcy court with respect to implementing such order shall be appealed only to the United States Court of Appeals for the Seventh Circuit within 5 days after the order of the Commission or the bankruptcy court, whichever is later, and shall be determined within 60 days after the appeal is filed. Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

Under Section 7(d), (e), and (f) of the Milwaukee Railroad Restructuring Act, certain obligations to the United States were subordinated to the creditors, but not the stockholders. Hence, there is a gap between these two classes of interests. The House

amendment eliminates this gap, by forgiving such subordinated obligations to the United States when the Milwaukee Railroad is either successfully reorganized as a rail carrier or when more than 50% of the railroad as it exists on the effective date of the Staggers Rail Act is purchased and 50% of its employees on that date have obtained employment with other carriers. By eliminating this gap in this way, the House amendment will encourage the Milwaukee Railroad's stockholders to seek a successful reorganization or purchase and not feel it necessary to seek liquidation at this time.

Additional funds for Transaction Assistance under the Rock Island Transition Act for the purchase of abandoned lines by non-rail carrier entities of the Rock Island Railroad and Milwaukee Railroad and for rail banking of lines of the Milwaukee Railroad in Montana are made available. The Secretary may determine if applications for purchase filed after September 15, 1980, are appropriate. Other than the funds specifically reserved for Montana[,] Transition assistance funds should be equitably distributed without State preference to non-carrier entities which have applied for funds.

Conference substitute. The Conference substitute adopts the House provision, with minor modifications and deletion of the new findings for the Rock Island Transition Act. The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The

conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated an [d] hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore

recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the

other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the

labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated [*sic*] appellate procedure. The second, including the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrusion of the Court into this implementation of this statutory program on constitutional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constitutional issues here. My reservations, however, are as to the procedural anomalies which this statute embodies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors

and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "Continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the

public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward, that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not

necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy

Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN: Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel. I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

APPENDIX D

PRELIMINARY INJUNCTION
JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a com-

plaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____ Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX E

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 20, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting what I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heared a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such as a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that

threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone in this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for

expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward [*sic*], and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward [*sic*] and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal

from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out of the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing is unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen have given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutionality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be

no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief, that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX F

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I

would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all un-

constitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX G

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants.

No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock

Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements

appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR

United States District Judge

DATED: October 15, 1980

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1, lines 1 and 2 [p. b-1, lines 1 and 2 and first two words of line 3] should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3, line 13 [p. b-3, lines 14 and 15] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4, line 4 [p. b-3, line 32] should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4, line 16 [p. b-4, line 11] should read: "4) The court orders the continuance of the preliminary injunction: . . ."